FILED
MAY 3 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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No. 05-380

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

v.

LEROY CARHART, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE THOMAS MORE SOCIETY, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

The Thomas More Society, Inc., is a non-profit, public interest law firm based in Chicago, Illinois. It was founded in 1997 to meet the burgeoning legal needs of the pro-life movement. Incorporated as a 501(c)(3) not-for-profit corporation under the laws of the State of Illinois, the Thomas More Society provides legal advice and assistance to those who face harassment, employment discrimination, unjust treatment, civil litigation or criminal prosecution as a result of their pro-life views or their peaceful protest activities. In recent years, the Thomas More Society has provided legal services and assistance (including through the submission of *amicus* briefs, *see, e.g.*, *Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961 (2006)) in a wide range of cases, including in this Court the representation of the named petitioners in *Scheidler v. NOW*, 537 U.S. 393, 411 (2003), and *Scheidler v. NOW*, 125 S. Ct. 2991 (2006).

The Thomas More Society draws its name and its inspiration from Sir Thomas More (1478-1525), the English lawyer, author and Lord Chancellor who resigned that office out of principle, was convicted of treason and put to death by Henry VIII, and was canonized 400 years after his death. In addition to the legal representation it provides, the Thomas More Society also recognizes (and supports before legislative, executive and judicial bodies) appropriate public policy measures that are intended to protect innocent prenatal human life. Consistent with its core mission and the respect for human life that mission implies, the Thomas More Society respectfully submits this brief in support of petitioner the United States and in defense of the Partial-Birth Abortion Ban Act of 2003.

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[*] Letters of consent have been filed with the Clerk. None of the counsel for the parties authored this brief in whole or in part, and no one other than *amicus* or its counsel has contributed money or services to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The stark and somber issue presented by this case is whether the United States has the constitutional authority to ban an abortion procedure, variously described in the medical literature and trial testimony as "intact dilation and evacuation" (intact D&E) or "dilation and extraction" (D&X), that Congress has characterized as "gruesome and inhumane." Pub. L. No. 108-105, § 2(1), 117 Stat. 1201. In that procedure, a physician

> deliberately and intentionally vaginally delivers a living, unborn child's body until either the entire baby's head is outside the body of the mother, or any part of the baby's trunk past the navel is outside the body of the mother and only the head remains inside the womb, for the purpose of performing an overt act (usually the puncturing of the back of the child's skull and removing the baby's brains) that the [physician] knows will kill the partially delivered infant, performs this act, and then completes the delivery of the dead infant . . . .

Id.

Based upon this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Eighth Circuit held that the Partial-Birth Abortion Ban Act of 2003 (the Act), 18 U.S.C. § 1531, which prohibits this procedure, subject to an exception for the life of the mother, is unconstitutional because it lacks a health exception. *See Carhart v. Gonzales*, 413 F.3d 791, 795-804 (8th Cir. 2005). For the reasons set forth in the Solicitor General's brief, that holding was erroneous and should be reversed. Rather than directly address the court of appeal's flawed holding or reiterate the government's arguments, *amicus* addresses three closely related issues that are important to the proper disposition of this case.

1. *Standing*. Respondents lack standing to challenge the Act because they do not perform (or intend to perform) the procedure the Act prohibits. Properly interpreted, the Act does

not apply unless, at the outset of an abortion procedure, the physician has the *specific intent* to perform the abortion in the manner forbidden by the Act. Yet a careful review of the testimony presented at trial reveals that none of the respondents has that intent. Accordingly, respondents lack standing to challenge the Act.

2. *Undue Burden.* Assuming that respondents have standing, their alternative argument – that the Act imposes an "undue burden" on women seeking second-trimester abortions, in violation of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) – should be rejected. In their Supplemental Complaint, respondents contended, *inter alia*, that the Act imposes an "undue burden" on women seeking second-trimester abortions because the Act's definition of the prohibited procedure ("partial-birth abortion")[1] includes not only intact D&E abortions but also other second-trimester abortion procedures – such as dismemberment D&Es and inductions, which account for almost all second-trimester abortions, and procedures to treat spontaneous abortions (miscarriages). *See* Supplemental Cplt. at 2, ¶ 4; 3-5, ¶¶ 9-12; 10-11, ¶¶ 42-45; 13, ¶¶ 54-55. The district court rejected respondents' claim that the Act applies to induction procedures (or to the treatment of spontaneous abortions), *see Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1032-

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[1] The Act defines "partial-birth abortion" as "an abortion in which the person performing the abortion – (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of the delivery, that kills the partially delivered living fetus." 18 U.S.C. § 1531(b)(1).

34 (D. Neb. 2004),[2] but accepted their claim that the Act applies to dismemberment D&Es, at least in certain situations. *Id.* at 1030-37.[3]

Respondents' claim that the Act extends to dismemberment D&Es and inductions is based upon a tortured interpretation of the words of the Act.[4] Apart from any textual analysis of the Act, however, respondents' "undue burden" claim can be shown to be ill-founded by an examination of abortion reporting data from six States whose partial-birth abortion acts – drafted with far less precision than the Act under consideration here – were not enjoined prior to this Court's decision in *Stenberg*. Review of these data reveals that the enactment of such laws did not prevent physicians from performing dismemberment D&Es and inductions. This, in turn, suggests that respondents' alleged fear that enforcement of the Partial-Birth Abortion Ban Act of 2003 would prevent women from obtaining conventional second-trimester abortions (dismemberment D&Es and inductions) is baseless.

3. *Scope of Relief.* Assuming that respondents have standing to challenge the Act, and further assuming that the Act is unconstitutional in at least some of its applications, the Eighth Circuit erred in declaring the Act unconstitutional on its face and enjoining enforcement of the Act in all of its applica-

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[2] In light of its interpretation of the language and terminology of the Act, the district court also properly rejected respondents' vagueness challenge and their argument that the "life-of-the-mother" exception in the Act is too narrow. 331 F. Supp. 2d at 1038-39, 1040-42.

[3] The Eighth Circuit did not reach this issue. *See Carhart*, 413 F.3d at 803-04.

[4] None of the respondents performs induction procedures. Thus, they lack standing to challenge the Act on the basis that it purportedly prohibits such procedures. *See* Argument I, *infra*.

tions. Under this Court's recent decision in *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006), this was error. The Act should not have been enjoined with respect to procedures respondents do not perform or which do not otherwise violate the terms of the Act.

ARGUMENT

I.

RESPONDENTS LACK STANDING TO CHALLENGE THE PARTIAL-BIRTH ABORTION BAN ACT

Respondents lack standing to challenge the statute, 18 U.S.C. § 1531, because properly construed it simply does not prohibit any of the procedures that respondents use in performing abortions. The "irreducible constitutional minimum of standing" under Article III, § 2, or the Constitution includes three requirements:

> First and foremost, there must be alleged (and ultimately proved) an *injury in fact* – a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. Second, there must be *causation* – a fairly traceable connection between the plaintiff's injury and the complained-of-conduct of the defendant. And third, there must be *redressability* – a likelihood that the requested relief will redress the alleged injury. This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-04 (1998) (emphasis added; citations and internal quotation marks omitted). If a plaintiff fails to prove any one of these requirements, a court must dismiss the case for lack of standing. *Id.*

Respondents have failed to allege and prove the first

requirement, injury-in-fact, with respect to any of their claims because the Act, in light of the limiting construction sensibly proposed by the Government and correctly accepted by the district court, does not prohibit any of the abortion procedures that respondents currently perform. Under that construction, "unless a physician begins a particular abortion *with a premeditated and specific intent to perform the abortion in the manner the Act forbids*, the physician has not acted in violation of the statute, even if it so happens, as he or she proceeds, that the fetus's head gets stuck and must be crushed, or its contents removed, to complete the delivery." *Carhart*, 331 F. Supp. 2d at 1033 (emphasis added). As we next explain, none of the respondents has such an intent; hence, none has standing to challenge the Act.

Dr. Fitzhugh performs between 250 and 350 second-trimester abortions per year, all of which are D&Es. Tr. 212, 270-271.[5] In the course of a year, only two or three times will the fetus emerge from the woman's body intact up to its head, which is trapped at the internal os of the cervix. Tr. 245-246. In those situations, Dr. Fitzhugh typically crushes the fetus's skull before completing the abortion. Tr. 246, 253, 303. In his opinion, the Act "could apply" to those procedures. Tr. 266. At the outset of an abortion, however, Dr. Fitzhugh has "no idea" whether the fetus will come out intact up to the head. Tr. 246. His usual method of performing a D&E is fetal disarticulation (dismemberment). Tr. 256, 276. When he performs a D&E, Dr. Fitzhugh "expect[s]" dismemberment to occur; he does not expect to remove the fetus intact. Tr. 276-277. And he does not take any steps to ensure that the fetus comes out intact (or largely intact). Tr. 277.

Dr. Vibhakar performs first- and second-trimester abortions. Tr. 312-313. Between 2001 and 2003, she

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[5] Dr. Fitzhugh does not perform induction abortions. Tr. 211, 258-259.

performed 264 second-trimester abortions at the Emma Goldman Clinic (using the D&E procedure) and another one to three abortions per month at the University of Iowa hospitals and clinics. Tr. 313.[6] Since her residency, Dr. Vibhakar has never encountered a situation in which the fetus has emerged from the mother completely intact, and only once or twice did the fetus emerge intact to the fetus's head, in which case she "disarticulated the body from the calvarium, and then compressed the calvarium with the forceps and extracted the calvarium." Tr. 341-342. *See also* Tr. 362, 381-382. In neither case did she "specifically try to extract the entire body of the fetus and have the head get stuck during [the] procedure." Tr. 382. Dr. Vibhakar cannot predict at the outset how an abortion procedure will develop. Tr. 346. She does not perform intact D&Es (also described as D&X procedures), but only dismemberment D&Es. Tr. 345, 362, 375, 380. Dr. Vibhakar "encounter[s] fetal dismemberment, disarticulation 100% of the time" in performing second-trimester D&Es. Tr. 362.

Dr. Knorr performs first- and second-trimester abortions. In 2003, he performed between 5,000 and 6,000 abortions, of which 12 to 15% (600 to 900) were second-trimester procedures. Tr. 500-501. Dr. Knorr uses the D&E procedure in the second trimester. Tr. 500, 503-504. He does not perform induction abortions. Tr. 519. In his experience performing second-trimester abortions, the fetus comes out intact up to the head only once every six weeks or so. Tr. 515. *See also* Tr. 575-576 (estimating that this occurs perhaps ten times per year). In that situation, which is not expected, he either compresses the skull with forceps or punctures the skull to drain its contents to complete the abortion. Tr. 516, 518. In performing a D&E,

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[6] The record suggests that Dr. Vibhakar does not personally perform induction abortions at the University of Iowa (such procedures are not offered at the Emma Goldman Clinic). *See* Tr. 316, 347, 390-391.

Dr. Knorr expects to remove the fetus "in large pieces." Tr. 517. Dismemberment is the "predominant characteristic of second trimester D&Es." Tr. 540. At the outset of performing a second-trimester abortion, Dr. Knorr never intends to extract the fetus intact up to the head, then crush or puncture the skull to remove its contents, before completing the procedure. Tr. 556-557. *See also* Tr. 571-572 (he does not have any desire to bring the fetus out "largely intact" for reasons relating to the safety of the procedure). He does not plan for that to happen or know that it is going to happen in any given case. Tr. 557.

It is apparent from the foregoing testimony that neither Dr. Fitzhugh, nor Dr. Vibhakar, nor Dr. Knorr has the requisite specific intent, *at the outset of performing an abortion*, to engage in the conduct prohibited by the Act. All three physicians perform dismemberment D&Es, not intact D&Es, and none of them expects or intends to deliver a living fetus intact (or largely intact) for the purpose of killing the fetus after it has been partially vaginally delivered in the manner described by the Act. The district court did *not* find that the abortion procedures used by any of these physicians fall within the definition of "partial-birth abortion," when interpreted in light of the Government's specific intent limiting construction. The court recognized that "physicians who intend only to perform a D&E . . . lack the specific intent, prior to the beginning of the procedure, to deliver a living fetus past a specific anatomical point on both the fetus and woman, and only then, in mid-delivery, inflicting the killing act." *Carhart*, 331 F. Supp. 2d at 1033-34. Instead, the court focused on the testimony of Dr. Carhart. *Id.* at 1034-37. But a careful examination of his testimony indicates that his abortion procedures also do not fall within the ambit of the Act.

Dr. Carhart performs both first- and second-trimester abortions. Tr. 591. In 2003, he performed 1,480 abortions; during the previous five years he performed 1,400 abortions per year of which 180 were second-trimester abortions. Tr. 593-

594. Dr. Carhart's abortion method of choice for second-trimester abortions is dilation and evacuation (D&E); he does not perform induction abortions as a procedure distinct from D&Es, although he incorporates induction-like procedures into his D&Es at and after 18 weeks' gestation. Tr. 621-623, 701, 738, 743-744. Dr. Carhart stated that it is always his objective to remove the fetus intact, or as intact as possible. Tr. 608, 619, 652, 689, 708, 745-746. It is impossible to know in advance, however, how a particular abortion method will progress. Tr. 647. In performing D&Es before 18 weeks' gestation, Dr. Carhart "normally removes the fetus intact," in "two [or] three pieces." Tr. 627. He testified:

> I can often get up to the base of the skull then go back and remove the skull. I can often get both lower extremities, and divide somewhere at the upper part of the spinal cord, removing abdominal organs and some even thoracic organs on the very first removal.

Tr. 627.

After the 13th week of gestation and before the 18th week, the fetus emerges intact to the calvarium no more than four to six times a year. Tr. 728-729. Dr. Carhart admitted that only a "small percentage" of fetuses emerge intact up to the head, Tr. 692-694, and, with respect to fetuses under 18 weeks gestational age, the percentage is "much, much smaller." Tr. 692. On the few occasions when the fetus's head does get stuck in the internal os, Dr. Carhart reduces the size of the head either by puncturing the base of the skull with a sharp instrument and draining its contents or compressing the skull (usually with forceps) to reduce its size in order to complete the delivery. Tr. 690-691, 705-708, 719-720, 746. Most of these procedures are performed at or after 18 weeks' gestation. Tr. 695. At that stage of pregnancy, Dr. Carhart always causes fetal demise before beginning the procedure by injecting the fetus with a combination of drugs. Tr. 607-608, 629-630, 644, 668. He refers to this as "fetal euthanasia." Tr. 655-656, 670-671.

It is clear from his testimony that Dr. Carhart very rarely performs intact D&Es. Even in those few instances, however, he does not know, when he begins a second-trimester abortion, whether he is going to perform a dismemberment D&E (95% of the time) or an intact D&E (5% of the time). The district court determined that Dr. Carhart "always has the specific intent to do *either* a D&E *or* the banned procedure on a living fetus when he begins the abortion during this age range [12-17 weeks]. *But he does not know which procedure he will perform until he has performed it.*" *Carhart*, 331 F. Supp. 2d at 1034 (emphasis added).

Amicus submits that if Dr. Carhart "does not know which procedure he will perform until he has performed it," he cannot be said to have the specific intent, *at the outset of the procedure*, to perform an abortion in the manner prohibited by the Act, as the Government itself noted in its closing argument. *See* Tr. 1901-02, 1908-09, 1927-28. His conduct in performing second-trimester D&E abortions, therefore, does not fall within the scope of the Act. Neither Dr. Carhart nor any of the other three respondent physicians has standing to challenge the Act because none of them "begins a particular abortion with a premeditated and specific intent to perform the abortion in the manner the Act forbids . . . ." *Carhart*, 331 F. Supp. 2d at 1033. Accordingly, the judgment of the court of appeals declaring the Act unconstitutional and enjoining its enforcement should be reversed and respondents' supplemental complaint dismissed for lack of standing.

II.

RESPONDENTS' ALTERNATIVE ARGUMENT – THAT THE ACT IMPOSES AN "UNDUE BURDEN" ON WOMEN SEEKING SECOND-TRIMESTER ABORTIONS – IS REFUTED BY THE ACT'S TEXT AND BY EMPIRICAL DATA

In their complaint, respondents alleged that "the Act

defines the term 'partial-birth abortion' so broadly as to ban the safest and most common methods of abortion starting at least at the beginning of the second-trimester of pregnancy, including the Dilation and Evacuation ('D&E') method of abortion, and thus 'imposes an undue burden on a woman's ability' to choose abortion." Supp. Cplt. at 2, ¶ 4 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992)). "Alternatively, the Act is so vague that it fails to give physicians fair warning of which abortion procedures are prohibited." *Id.* Respondents alleged further that "[b]ecause of the breadth and ambiguity in the Act's definition of 'partial-birth abortion,' the Act could reach any D&E, intact D&E, or induction abortion starting at the beginning of the second trimester of pregnancy." *Id.* at 10, ¶ 42.

Each named respondent physician alleged that he or she "reasonably fears . . . criminal prosecution and civil liability under the Act" for performing "second trimester abortions," including D&E abortions. *Id.* at 3-5, ¶¶ 9-12. By prohibiting them from performing these abortions, respondents alleged, "the Act has both the purpose and effect of imposing an undue burden on a woman's right to choose abortion and thus violates the woman's rights to privacy and liberty." *Id.* at 13, ¶ 59(a). They alleged further that the Act is "void for vagueness in violation of the Due Process Clause of the Fifth Amendment" because it fails "to give adequate notice of the procedures it proscribes [and] encourag[es] arbitrary and discriminatory enforcement." *Id.* at 14, ¶ 61.

At trial, respondents testified that they believed that the Act, if allowed to go into effect, would prohibit them from performing some or all conventional second-trimester abortion procedures, including dismemberment D&Es and inductions, and even surgical procedures to treat spontaneous abortions (miscarriages), as well as the intact D&E procedure. *See* Tr. 265-267 (Fitzhugh); 351-353 (Vibhakar); 523-525 (Knorr);

640-642 (Carhart).[7]

Analysis of the text of the Act should allay respondents' unfounded fears of prosecution. Physicians who "deliberately and intentionally" perform inductions or dismemberment D&Es do not perform such procedures with the deliberate intent to deliver the fetal head or trunk outside the mother's body "for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus." Quite the contrary. The conventional D&E procedure contemplates fetal dismemberment and death while the fetus is within or almost entirely within the mother's uterus. *See Stenberg*, 530 U.S. at 924-27. And induction in itself merely involves induced premature delivery of a fetus. Neither procedure deliberately or intentionally anticipates partial delivery as described by the Act, and neither procedure is undertaken with the intention of causing partial vaginal delivery of a living fetus for the purpose of killing the fetus after such partial delivery. Thus, neither procedure falls within the scope of the Act, as the district court correctly ruled. *See Carhart*, 331 F. Supp. 2d at 1032-34.

Moreover, the events that could lead to any purported need to kill a fetus to complete a delivery *after* a dismemberment D&E abortion or induction has begun are events that simply *might* occur, but are not intentionally or deliberately planned as part of these procedures (as the Act, properly construed, requires). *See* Argument I, *supra* (discussion of Government's proposed limiting construction of the Act). In such procedures, physicians may cause fetal death after the fetus has been partially vaginally delivered without violating the Act because, at the outset of the procedure, they did not deliberately or intentionally act to partially deliver the fetus outside the

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[7] Respondents, as noted above, *see* Argument I, *supra*, do not perform induction abortions.

maternal body for the purpose of killing the fetus.[8]

Apart from the foregoing textual analysis, empirical data drawn from the experience of some States demonstrate the lack of foundation for respondents' professed fears that the Act, if not struck down, would be applied to the most common second-trimester abortion procedures, including dismemberment D&Es and inductions. The Act, of course, has never been allowed to go into effect. For that reason, it is impossible to determine on an empirical basis whether respondents' fears are well-founded or simply reflect an unreasonable misunderstanding of the law. There is, however, a practical method of testing respondents' theory that the Act applies (or would be applied) to the most commonly performed second-trimester abortion procedures. That method involves an examination of official abortion reporting data from the five States (Indiana, Mississippi, South Carolina, South Dakota and Tennessee) whose partial-birth abortion acts were not challenged prior to this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), and from one State (Virginia) whose law was allowed to go into effect during

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[8] Respondents' claim that the Act extends to spontaneous abortions (miscarriages) is simply wrong. The Act's plain language penalizes only physicians who "deliberately and intentionally" deliver a fetus "for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus," and then "performs the overt act, other than completion of delivery, that kills the partially delivered living fetus." 18 U.S.C. § 1531(b)(1). Physicians may perform any act, including an act overtly intended to kill a partially miscarried fetus, when they do not deliberately and intentionally deliver a fetus in order to perform such an overt killing act – which, by definition, physicians *do not do* in the event of "spontaneous" abortion. *See Carhart*, 331 F. Supp. 2d at 1032-34 (correctly holding that the Act does not apply to the treatment of spontaneous abortions).

litigation.[9]

Prior to *Stenberg*, thirty States had enacted statutes

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[9] Assuming that these data are not legislative facts, they are adjudicative facts of which the Court may take judicial notice. Rule 201 of the Federal Rules of Evidence permits a court to take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b)(2). Judicial notice may be taken "at any stage of the proceeding," FED. R. EVID. 201(f), including on appeal. *See United States v. Gonzalez*, 442 F.2d 698, 708 n. 8 (2d Cir. 1971) (*en banc*) (taking judicial notice on appeal of Department of Narcotics and Dangerous Drugs reports on the thefts of legally possessed cocaine), *cert. denied sub nom. Ovalle v. United States*, 404 U.S. 845 (1971); *see also In re Indian Palms Associates, Ltd.*, 61 F.3d 197, 205 (3d Cir. 1995) (recognizing court's authority to take judicial notice on appeal). In *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1064 n. 7 (9th Cir. 1998), the Ninth Circuit held that the district court had properly taken judicial notice on appeal of public records of the state department of health, which is precisely the nature of the data *amicus* brings to the Court's attention in this brief. In *Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1050 (1986), the First Circuit took judicial notice of census data and health statistics, including abortion reporting data, for the first time on appeal. *Id.* at 998-99 & nn. 4-16. Other circuit courts have taken judicial notice of census data on appeal, which is similar to the abortion reporting data set forth herein. *See Goins v. Allgood*, 391 F.2d 692, 697 (5th Cir. 1968); *Mitchell v. Rose*, 570 F.2d 129, 132, n. 2 (6th Cir. 1978), *rev'd on other grounds*, 443 U.S. 545 (1979); *United States v. United Brotherhood of Carpenters & Joiners of America, Local 169*, 457 F.2d 210, 214 n. 7 (7th Cir. 1972), *cert. denied* 409 U.S. 851 (1972); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 n. 4 (8th Cir. 1970); *United States v. Esquivel*, 88 F.3d 722, 726-27 (9th Cir. 1996), *cert. denied*, 519 U.S. 985 (1996); *United States v. Phillips*, 287 F.3d 1053, 1055 n. 1 (11th Cir. 2001); *Moore v. Comfed Savings Bank*, 908 F.2d 834, 841 n. 4 (11th Cir. 1990). The documents authenticating the data discussed in this brief are included in the appendices.

prohibiting partial-birth abortions.[10] Abortion providers challenged the statutes in twenty-one of these States and, before *Stenberg* was decided, succeeded in preventing eighteen of them from going into effect.[11] Data reporting on abortions are

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[10] Those States are: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia and Wisconsin.

[11] Statutes were challenged in Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, Rhode Island, Virginia, West Virginia and Wisconsin. Enforcement of the statutes in all but three of these States was enjoined prior to *Stenberg*. In two States – Alabama and Georgia – the Attorneys General issued official opinions interpreting their statutes to apply to post-viability abortions only. *See Summit Medical Associates, P.C. v. James*, 984 F. Supp. 1404, 1414-15 (M.D. Ala. 1998) (interpreting ALA. CODE § 26-23-1 *et seq.* (Supp. 2005)), *aff'd in part, rev'd in part and remanded with directions*, 180 F.3d 1326 (11th Cir. 1999) (discussing Eleventh Amendment issues only), *cert. denied*, 529 U.S. 1012 (2000); *Midtown Hospital v. Miller*, 36 F. Supp. 2d 1360, 1367-70 (N.D.. Ga. 1997 & Sep. 2, 1998) (consent order) (interpreting GA. CODE ANN. § 16-12-144 (2003)). In the third State, Virginia, the law was in force from June 30, 1998, when a judge of the Fourth Circuit entered an order staying the preliminary injunction that had been issued by the district court, *see Richmond Medical Center for Women v. Gilmore*, 144 F.3d 326 (4th Cir. 1998) (Luttig, J., granting stay), which the Fourth Circuit thereafter refused to vacate, *see Richmond Medical Center for Women v. Gilmore*, 183 F.3d 303 (4th Cir. 1998), until July 16, 1999, when the district court entered its permanent injunction. *See Richmond Medical Center for Women v. Gilmore*, 55 F. Supp. 2d 441 (E.D. Va. 1999). Pursuant to an order entered on September 14, 1999, the permanent injunction was stayed pending appeal. *See Richmond Medical Center for Women v. Gilmore*, No. 98-1930 (4th

currently available from the six States whose partial-birth abortion statutes were not challenged or were allowed to go into effect.[12] In considering the significance of these data, it must be kept in mind that the statutes in these six States were not drafted with the same precision as the federal law at issue in this case.[13]

Cir. Sep. 14, 1999) (staying permanent injunction). That stay, in turn, was dissolved on July 28, 2000, following this Court's decision in *Stenberg*. *See Richmond Medical Center for Women v. Gilmore*, No. 98-1930 (4th Cir. July 28, 2000) (dissolving stay).

[12] Comparative abortion data are not available from the eighteen States whose partial-birth abortion acts were enjoined, from the four States whose laws apply (or have been interpreted to apply) only to post-viability abortions (*see* note 11, *supra*, for Alabama and Georgia, and *see also* KAN. STAT. ANN. § 65-6721 (2002), and UTAH CODE ANN. § 76-7-310.5 (2003)), from one State (Oklahoma) which did not publish or disclose reported abortion data for the relevant period, and from one State (North Dakota) where the sole abortion provider at the time performed only first-trimester abortions.

[13] Four of the six States whose reporting data are discussed in this brief defined "partial-birth abortion" to mean an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery. *See* IND. CODE ANN. § 16-18-2-267.5 (West Supp. 2005); MISS. CODE ANN. § 41-41-73(2)(a) (1999); S.C. CODE ANN. § 44-41-85(B)(1) (Law. Co-op. 2002); S.D. CODIFIED LAWS § 34-23A-32 (Michie Supp. 2003). In addition to that definition, *see* TENN. CODE ANN. § 39-15-209(a)(1) (2003), Tennessee defined "vaginally delivers a living fetus" to mean "deliberately and intentionally delivers into the vagina a living fetus, *or a substantial portion thereof*, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus." TENN. CODE ANN. § 39-15-209(a)(2) (2003) (emphasis added). As part of its definition of partial-birth abortion, Virginia added the phrase, "*or a substantial portion thereof*," to the words "living fetus." *See* VA. CODE ANN. § 18.2-74.2(D) (Michie Supp. 1999) (emphasis added).

Yet, despite the imprecise language of the statutes, physicians were not deterred from performing conventional second-trimester abortion procedures. They understood, in other words, that the partial-birth abortion statutes in these States did *not* prohibit dismemberment D&Es or inductions. And neither does the federal Partial-Birth Abortion Ban Act of 2003.

Indiana, Mississippi and South Dakota all enacted partial-birth abortion bans that became effective on July 1, 1997. *See* IND. CODE ANN. § 16-18-2-267.5 (West Supp. 2005) (defining offense); § 16-34-2-1(b) (West Supp. 2005) (prohibition); MISS. CODE ANN. § 41-41-71 *et seq.* (1999); S.D. CODIFIED LAWS § 34-23A-27 *et seq.* (Michie Supp. 2003). None of these statutes, prior to *Stenberg*, was construed by any state or federal court.

A comparison of abortion data from these States for the first half of 1997, when *none* of the statutes was in effect, to data for the second half of 1997, when *all* three statutes were in effect, leaves no doubt that respondents' expressed fears of being prosecuted for performing conventional second-trimester abortion procedures (dismemberment D&Es and induction) are baseless. Review of these data enables this Court, in the words of the Seventh Circuit, "to perform a reality check" on respondents' assertion that they would not be able to perform other second-trimester abortion procedures if the federal law were allowed to go into effect. *Hope Clinic v. Ryan*, 195 F.3d 857, 870 (7th Cir. 1999) (*en banc*), *vacated and remanded with directions*, 530 U.S. 1271 (2000), *on remand*, 249 F.3d 603 (7th Cir. 2001) (*en banc*).

Indiana

The Indiana State Department of Health reported that 13,208 abortions were performed in 1997, of which 12,429 were suction curettage, 87 sharp curettage, 159 dilation and evacuation (D&E), and two intra-uterine prostaglandin instilla-

tion. *See* Appendix A-2.[14] The data reflect that 54.71% of the dilation and evacuation procedures (87 of 159), and neither of the prostaglandin instillation procedures, were performed in the second half of the year (when the Indiana partial-birth abortion act was in effect). As these data show, the partial-birth abortion act did not prevent physicians in Indiana from performing dismemberment D&Es. Nor is there any evidence that physicians sought to avoid the impact of the law by sending their patients out of State. Dilation and evacuation procedures accounted for 1.03% of all abortion procedures performed during the *first* six months of 1997 (72 of 6,950) when the partial-birth abortion act was *not* in effect, but fully 1.39% of all procedures performed during the *second* six months of 1997 (87 of 6,258) when the act *was* in effect. "These data," as the Seventh Circuit noted, simply "are incompatible with plaintiffs' *a priori* belief that the partial-birth abortion statutes will discourage the performance of the D&E procedure or cause the physician to substitute an inferior procedure." *Hope Clinic*, 195 F.3d at 871. In the eighteen months *after* the Indiana partial-birth abortion statute took effect (July 1, 1997 through December 31, 1998), there were 286 D&Es, while in the eighteen months *before* the statute took effect (January 1, 1996, through June 30, 1997), there were 263 D&Es. *See* Appendix A-2 and INDIANA TERMINATED PREGNANCY REPORT 1996 (Jan. 1998) at 20 (Table 20), INDIANA NATALITY, INDUCED TERMINATION OF PREGNANCY, AND MARRIAGE REPORT[:] STATE, COUNTY, AND CITY DATA 1998 at 84 (Table 18). This certainly does not suggest that physicians in Indiana were deterred or discouraged from performing dismemberment D&Es by the enactment of the partial-birth abortion statute. Data from other States confirm

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[14] In addition, there were 371 unknown procedures and 160 procedures not otherwise classified. Of the former, 193 (52.02%) were performed in the second half of the year; of the latter, approximately 2/3 (109 of 160) were performed in the second half of the year. *Id.*

the Seventh Circuit's sense that "partial-birth abortion statutes need not have [and, in fact, did not have] the baleful effect the respondents foresee." *Hope Clinic*, 195 F.3d at 817.

Mississippi

The Mississippi State Department of Health reported that 4,325 abortions were performed in Mississippi in 1997, of which 2,494 were suction curettage, one sharp curettage, 1,788 dilation and evacuation (D&E), and 23 intra-uterine prostaglandin instillation. *See* MISSISSIPPI VITAL STATISTICS 1997 at 43 (Table F3).[15] A breakdown of the data by procedure and month discloses that 41.94% of the dilation and evacuation procedures (750 of 1,788), and almost two-thirds of the prostaglandin instillation procedures (15 of 23) were performed in the *second* half of the year, during the time that the Mississippi partial-birth abortion act was in effect. *See* Appendix B-2. Although the number of D&Es as a percentage of all abortions declined from 44.07% for the first six months of the year (1,038 of 2,355) to 38.07% for the second six months of the year (750 of 1,970), both the number of D&Es performed in the second half of the year (750) and the number of D&Es as a percentage of all abortions for the second half of 1997 (38.07%) leave little doubt that Mississippi's partial-birth abortion act did not prevent physicians in Mississippi from performing dismemberment D&Es. Nor, given the greater numbers of induction abortions performed in the second half of the year, were Mississippi physicians deterred from performing induction procedures.

In 1998, the first full year after the Mississippi partial-birth abortion act took effect, almost one-third of all abortions performed in Mississippi (1,287 of 3,955) were D&Es. *See* MISSISSIPPI VITAL STATISTICS 1998, Table F3 at 43. This represents a slight decline from 1996, the last full year before

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[15] In addition, there were 19 procedures not otherwise classified. *Id.*

the partial-birth abortion act took effect, when approximately 37% of all abortions (1,553 of 4,206) were D&Es. *See* MISSISSIPPI VITAL STATISTICS 1996, Table F3 at 43. Nevertheless, the small number of instillation procedures (32) and procedures not otherwise classified (13), which together account for barely one percent of all abortion procedures performed in 1998, suggests that physicians performing abortions in Mississippi were not deterred from performing dismemberment D&E procedures after the partial-birth abortion act became effective. But perhaps the most significant statistic is that more than 2,000 D&Es were performed in Mississippi in the eighteen months *after* the partial-birth abortion act became effective on July 1, 1997. *See* Appendix B-2 and MISSISSIPPI VITAL STATISTICS 1998 at 43 (Table F3). Thus, there is no evidence that physicians in Mississippi were deterred from performing dismemberment D&Es by the unchallenged partial-birth abortion act.

South Dakota

The South Dakota Department of Health reported that 919 abortions were performed in South Dakota in 1997, of which 702 were suction curettage and 217 were dilation and evacuation (D&E). *See* SOUTH DAKOTA VITAL STATISTICS & HEALTH STATUS 1997 at 67-68 & 77 (Figure 24). A breakdown of the data by procedure and month reveals that 26.92% of the suction curettage procedures (189 of 702) and all but one of the dilation and evacuation procedures (216 of 217) were performed in the *second* half of the year, during which time the South Dakota partial-birth abortion act *was* in effect. *See* Appendix C-2.[16] Quite obviously, the South Dakota partial-birth abortion act did

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[16] That all but one of the D&Es were performed in the last four months of the year, when only 15 suction curettage procedures were performed, may have been attributable to the retirement of one abortion provider, who preferred using suction curettage, and his replacement by another provider, who preferred using D&Es. The month of procedure was not stated for two curettage procedures.

not prevent physicians from performing dismemberment D&Es in South Dakota. Remarkably, almost three times as many D&Es were performed in the eighteen months *after* the South Dakota partial-birth abortion act took effect (889 procedures) as in the eighteen months *before* the act took effect (307 procedures). *See* Appendices C-2, C-4.

Virginia

As the result of Judge Luttig's stay of a lower court's preliminary injunction (entered by the Fourth Circuit on June 30, 1998), *see Richmond Medical Center for Women v. Gilmore*, 144 F.3d 326 (4th Cir.) (Luttig, J.), the Virginia partial-birth abortion act (*see* VA. CODE ANN. § 18.2-74.2 (Michie Supp. 1999)) went into effect on July 1, 1998. The experience of physicians performing abortions in Virginia after the statute took effect completely belied the assertions of the plaintiff physicians at the hearing on the motion for a preliminary injunction that, in the words of the district court, "the Act is written so broadly and vaguely that a prosecutor could interpret the Act to include the procedures these physicians perform such as . . . D&E [dilation and evacuation], as the plaintiffs perform them." *Richmond Medical Center for Women v. Gilmore*, 11 F. Supp. 2d 795, 805 (E.D. Va. 1998). Accordingly, the plaintiffs' professed "fear [of] prosecution and the loss of their medical license to practice if they continue performing abortions in their normal course of practice," *id.*, was shown to be groundless.

The Virginia Department of Health reported that 26,115 abortions were performed in Virginia in 1998, of which 24,920 were suction curettage, 14 sharp curettage, 268 dilation and evacuation (D&E), 11 intra-uterine saline instillation and 98 intra-uterine prostaglandin instillation. *See* Appendix D-2.[17] Of

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[17] The Department reported three hysterectomies, two hysterotomies, 76 unknown procedures and 723 procedures not otherwise classified. *Id.*

these, 46.26% of the dilation and evacuation procedures (124 of 268) and approximately one-half of the instillation procedures (55 of 109) were performed in the *second* half of the year when the Virginia partial-birth abortion act *was* in effect. Dilation and evacuation procedures accounted for 1.07% of all abortions performed in the first six months (144 of 13,341) and 0.97% of all abortions performed in the last six months (124 of 12,773). Although the number of D&Es declined by 13.88% from the first half of the year to the second half of the year (144 to 124), the number of D&Es performed in the second half of the year (124) suggests, as in the case of Mississippi, that the partial-birth abortion act did not prevent physicians in Virginia from performing dismemberment D&Es. Indeed, more D&Es were performed in the last six months of 1998 (124), when the partial-birth abortion act *was* in effect, than in the last six months of 1997 (121), when the law was *not* in effect. *See* Appendices D-2, D-3. So, too, significantly more inductions were performed in the last six months of 1998 (55), when the partial-birth abortion act *was* in effect, than in the last six months of 1997 (30), when the law was *not* in effect. *See* Appendices D-2, D-3.

To summarize the foregoing data, almost 1,200 D&Es were performed in just four States in the first six months *after* their partial-birth abortion acts went into effect.[18] Clearly, the physicians in those States were not deterred from performing from performing dismemberment D&E abortions. Nor is there any evidence that these laws had any discernable impact on the incidence of induction abortions. A total of 70 inductions were performed in Mississippi (15) and Virginia (55) in the first six months their partial-birth abortion acts were in effect, compared to 62 in the previous six months. *See* Appendices B-2, D-2.

Abortion data from South Carolina and Tennessee, where

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[18] Dilation and evacuation: Indiana (87); Mississippi (750); South Dakota (216); Virginia (124).

few D&Es were performed in 1997 either before or after enactment of their partial-birth abortion acts, confirm that the statutes in these States did not prevent physicians from performing either D&Es or inductions.

South Carolina

The South Carolina partial-birth abortion act became effective on March 26, 1997. *See* S.C. CODE ANN.§ 44-41-85 (Law Co-op. 2002). The South Carolina Department of Health & Environmental Control reported that 9,212 abortions were performed in South Carolina in 1997, of which 9,158 were suction curettage, two dilation and evacuation (D&E), one intra-uterine saline instillation and twenty intra-uterine prostaglandin instillation. *See* Appendix E-1.[19] The data show that three-fourths of the instillation procedures (15 of 21), and both D&Es were performed in the last nine months of the year (when the South Carolina partial-birth abortion act was in effect). There is no evidence that the law prevented physicians from performing dismemberment D&Es or induction abortions. Although no D&Es were performed in 1998, the first full year after the partial-birth abortion act took effect, only 14 D&Es were performed in 1996, the last full year before the law took effect. *See* Appendix E-2 . This represents less than one-sixth of one percent of all abortions performed in 1996 (9,326).

Tennessee

The Tennessee partial-birth abortion act took became effective on July 1, 1997. *See* TENN. CODE ANN. § 39-15-209 (2003). The Tennessee Department of Health reported that 18,283 abortions were performed in Tennessee in 1997, of which 18,212 were suction curettage, seven dilation and evacuation (D&E), 56 intra-uterine prostaglandin instillation,

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[19] In addition, there were five unknown procedures and 26 procedures not otherwise classified. *Id.*

and one intra-uterine saline instillation. *See* Appendix F-2.[20] The data indicate that three of the seven dilation and evacuation procedures, 53.57% of the prostaglandin instillation procedures (30 of 56), and the one saline instillation procedure all were performed in the *second* half of the year, when the Tennessee partial-birth abortion act *was* in force. *Id.* Once again, there was no evidence that the partial-birth abortion act prevented physicians from performing dismemberment D&Es and inductions. The statistics suggest that, as in South Carolina, few physicians in Tennessee used the D&E procedure in 1997. Significantly, in 1998, the first full year after the Tennessee partial-birth abortion act took effect, there were 66 D&Es, while in 1996, the last full year before the act took effect, there were only four. *See* Appendices F-3, F-4. A more than sixteen-fold increase in the number of D&Es hardly bespeaks evidence that physicians were afraid to perform D&Es while the law was in effect. Whatever the reason for the increase, the unchallenged partial-birth abortion statute plainly had no deterrent effect on physicians' choice of procedure.

In evaluating the impact of the unchallenged state partial-birth abortion laws on the incidence of dismemberment D&Es and inductions, the experience of States whose laws were not enjoined or otherwise called into question *prior* to this Court's decision in *Stenberg* is highly instructive. Equally instructive, however, is the experience of these States *subsequent* to *Stenberg*. *Stenberg* was decided on June 28, 2000. As of that date, none of the foregoing partial-birth abortion statutes was enforceable. Had physicians in those States whose laws had not been enjoined been deterred from performing dismemberment D&Es and labor inductions before the opinion in *Stenberg* was announced, one would expect a dramatic increase in the numbers of such abortions in the second half of 2000. The

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[20] There was one hysterectomy procedure and in six cases the procedure was unknown. *Id.*

official abortion reporting data from Indiana, Mississippi and Virginia, however, do not show such an increase.[21]

In Indiana, significantly more D&Es were performed in the *first* half of 2000 (122) than in the *second* half of the year (89). *See* Appendix A-3.[22] In Mississippi, the overwhelming majority of D&Es (58 of 68, or 82.95%) were performed in the *first* half of 2000. *See* Appendix B-3. Although few intrauterine instillation procedures were reported for Mississippi in 2000, the majority of them (9 of 14) were performed in the *first* half of the year. *Id.*[23] In Virginia, slightly more than one-half of the D&Es (1140 of 2154, or 53.57%) were performed in the *first* half of the year, as well as half (7 of 14) of the intra-uterine instillation procedures. *See* Appendix D-4.[24]

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[21] In South Dakota, the overwhelming majority of abortions performed in 2000 (840 of 878) were classified as "sharp curettage." *See* Appendix C-6. Thirteen were classified as "medical." Six of the twenty-five D&Es were performed in the first half of the year. *Id.* In South Carolina, only one D&E was reported for 2000, which was performed in June, and ten prostaglandin instillation (induction) procedures, three of which were performed in the first half of the year. *See* Appendix E-3. Tennessee no longer reports specific abortion procedures and no such statistics are available for 2000.

[22] The data for Indiana do not separately identify the number of labor induction procedures, if any, that were performed during the year. A total of 62 unknown procedures and 147 procedures not otherwise classified were performed in Indiana during 2000.

[23] Of the 3,758 abortions performed in Mississippi in 2000, most of which (3,653) were suction curettage, only 21 were not classified. *Id.*

[24] Virginia also reported 79 unknown procedures and 79 procedures not otherwise classified, slightly more than one-half of which (44 of the former and 47 of the latter) were performed in the last six months of the year. *Id.*

Notwithstanding respondents' claim that the Partial-Birth Abortion Ban Act of 2003 imposes an "undue burden" on their pregnant women patients seeking second-trimester abortions, a claim that could never be empirically challenged because of the preliminary injunction that was entered and continued during the litigation of this case, the experience in those States whose partial-birth abortion acts *were* allowed to go into effect prior to this Court's decision in *Stenberg* proves that physicians *did* understand the difference between what those acts did and did not prohibit. They did not prohibit – and *were not understood to prohibit* – dismemberment D&Es and labor inductions.

There is, in sum, *no* statistical evidence that the enactment of partial-birth abortion statutes (statutes drafted with far less precision than the one under review here) deterred physicians from performing dismemberment D&Es and labor inductions in those States whose laws were in force prior to this Court's decision in *Stenberg*. In fact, the evidence is directly to the contrary. That, in turn, suggests that respondents' expressed fears about being subjected to criminal prosecution (and civil liability) for performing dismemberment D&Es and inductions are unfounded.

III.

EVEN IF THE ACT IS UNCONSTITUTIONAL IN CERTAIN OF ITS APPLICATIONS, THE EIGHTH CIRCUIT ERRED IN HOLDING THE ACT UNCONSTITUTIONAL ON ITS FACE

Assuming that respondents have standing to challenge the Act, and further assuming that the Act is unconstitutional in certain of its applications (pre-viability intact D&Es performed with the specific intent of engaging in the conduct prohibited by the Act where fetal demise is not caused before the fetus is partially vaginally delivered), the court of appeals erred in holding the Act unconstitutional on its face.

This Court has recently reiterated the general rule that,

"when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, . . . or to sever its problematic portions while leaving the remainder intact . . . ." *Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961, 967 (2006) (citations omitted). Resort to that rule is particularly appropriate here because the statute applies to a broad range of conduct in which respondents do *not* engage and its unconstitutional applications, if any exist, are few.

First, the Act should not have been declared unconstitutional and enjoined with respect to post-viability abortions because, as the district court observed, *see* 331 F. Supp. 2d at 1045-47, there is no evidence in the record that any one of the respondents intentionally performs post-viability abortions.[25] *Amicus* recognizes that the Act does not distinguish between pre- and post-viability abortions – the prohibition of partial-birth abortions applies throughout pregnancy. Nevertheless, the *post*-viability applications of the Act simply do not affect respondents' practice. For that reason, the Act should not have

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[25] In her opening statement, respondents' counsel represented that "the plaintiffs don't perform procedures post-viability. We are only talking about pre-viability procedures." Tr. 163. *See also* Tr. 1837-38 (noting, in closing argument, that respondents do not perform post-viability abortions). That was borne out in the testimony. Both Dr. Fitzhugh (Tr. 253) and Dr. Carhart (Tr. 737-738) denied that they ever perform (or intend to perform) abortions after the fetus has reached viability. Although Dr. Knorr performs D&Es up to 24 weeks gestation, which approaches viability, he testified that he always causes fetal demise *before* beginning a D&E after 22 weeks. Tr. 559-560. Causing fetal demise before beginning an abortion would take his conduct outside the scope of the Act, which requires that the procedure be done on a *living* fetus. There was no evidence that Dr. Vibhakar intentionally performs D&Es after viability.

been declared unconstitutional on its face and enjoined in all of its applications.[26]

Second, the Act should not have been enjoined with respect to either induction procedures or procedures to treat spontaneous abortions (miscarriages) because the Act, properly construed, applies to neither, as the district court correctly held. *See* 331 F. Supp. 2d at 1032-34.

Finally, the Act should not have been enjoined with respect to D&Es where (a) the physician does not have the specific intent to perform the procedure prohibited by the Act at the outset of performing the abortion; (b) where the relative advantages to the pregnant woman's health of performing the prohibited procedure (as opposed to some other procedure) are only marginal; or (c) where fetal demise can be caused prior to commencement of the procedure without endangering the mother's health.

Assuming, therefore, that respondents have standing to challenge the Act and further assuming that the Act is unconstitutional in certain of its applications, the court of appeals was wrong to declare the Act unconstitutional on its face and enjoin its enforcement in all of its applications.

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[26] Because of the paucity of evidence presented on the issue, the district court refused to rule on the constitutionality of the Act as it applies to post-viability abortions and carefully crafted its declaration of unconstitutionality and its injunction so as not to include such applications. *See* 331 F.Supp.2d at 1042-48. Respondents did not cross-appeal that part of the district court's judgment. The court of appeals erred in expanding the scope of the district court's judgment.

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief of petitioner the United States, the judgment of the court of appeals should be reversed. In the alternative, the judgment should be modified by limiting the declaration of unconstitutionality, and the accompanying injunction, to the unconstitutional applications of the Act.

Respectfully submitted,

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May 10, 2006

**Counsel of Record*

APPENDIX A

INDIANA

[STATE SEAL]

Indiana State
Department of Health

An Equal Opportunity Employer

Mitchell E. Daniels, Jr.
Governor

Judith A. Monroe, M.D.
State Health Commissioner

March 16, 2006

Mister Paul Linton
921 Keystone Avenue
Northbrook, IL 60062

Dear Mister Linton:

I have attached the report of Indiana terminated pregnancies by month and procedure for 1997 and 2000, per your request. The data in the report are complete and accurate to the best of my knowledge. I can be reached at the address below or at 317-233-7807.

Sincerely,

/s/ Robert F. Teclaw

Robert F. Teclaw
State Epidemiologist and
Director, Epidemiology Resource Center

CERTIFIED MAIL NO. 7002 2410 0000 1837 5750

[ADDRESS OMITTED IN PRINTING]

STATE OF INDIANA _____)
) SS:
COUNTY OF *Marion* _____)

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for the above state and county on this 29th day of March, 2006.

/s/ Robin R. Collins
Robin R. Collins
Notary Public

My Commission Expires
April 21, 2007

[SEAL]

County
Marion

Induced Terminations of Pregnancy by Month and Procedure
Indiana Occurrences, 1997

Month of Termination	Suction Curettage	Sharp Curettage	Dilation and Evacuation	Intra-Uterine Prostaglandin Instillation	Other	Unknown	**Total**
January	1,149	10	13	1	8	44	**1,225**
February	1,084	10	9	0	5	42	**1,150**
March	1,079	7	16	1	4	14	**1,121**
April	1,132	5	4	0	7	21	**1,169**
May	1,142	9	10	0	8	27	**1,196**
June	1,011	9	20	0	19	30	**1,089**
July	1,026	8	24	0	7	70	**1,135**
August	976	4	18	0	19	75	**1,092**
September	983	5	7	0	31	4	**1,030**
October	1,026	7	20	0	16	18	**1,087**
November	918	7	11	0	21	23	**980**
December	903	6	7	0	15	3	**934**
Total	**12,429**	**87**	**159**	**2**	**160**	**371**	**13,208**

Induced Terminations of Pregnancy by Month and Procedure
Indiana Occurrences, 2000

Month of Termination	Suction Curettage	Sharp Curettage	Dilation and Evacuation	Other	Unknown	**Total**
January	1,074	19	17	11	19	**1,140**
February	1,106	4	31	6	13	**1,160**
March	1,035	3	22	16	4	**1,080**
April	992	1	17	4	1	**1,015**
May	996	1	19	13	5	**1,034**
June	1,125	5	16	9	6	**1,161**
July	896	1	10	21	3	**931**
August	992	0	18	9	5	**1,024**
September	899	1	16	8	0	**924**
October	976	2	18	19	3	**1, 018**
November	772	0	16	19	2	**809**
December	951	1	11	12	1	**976**
Total	**11,814**	**38**	**211**	**147**	**62**	**12,272**

Source: Indiana State Department of Health, Epidemiology Resource Center, Data Analysis Team

APPENDIX B

MISSISSIPPI

[STATE SEAL]

MISSISSIPPI DEPARTMENT OF HEALTH

March 31, 2006

I, Ann L. Leach, Supervisor of the Vital Statistics Unit of the Mississippi State Department of Health, certify that the attached tables, "Induced Terminations performed in Mississippi in 1997, by Primary Procedure and Month Procedure Was Done" and "Induced Terminations Performed in Mississippi in 2000 by Primary Procedure and Month Procedure Was Done," were obtained from this office.

These Figures were obtained from the individual records "Report of Induced Termination of Pregnancy Performed in Mississippi," which are required by law to be filed with this office by the person in charge of any institution in Mississippi in which an induced termination of pregnancy is performed.

/s/ Ann L. Leach
Ann L. Leach, Supervisor
Vital Statistics

STATE OF MISSISSIPPI)
)
COUNTY OF HINDS)

SUBSCRIBED AND SWORN TO before me, a Mississippi Statewide Notary Public on this 31st day of March, 2006.

/s/ Jacqueline Bland
Jacqueline Bland
Notary Public

Mississippi Statewide Notary Public
My Commission Expires March 22, 2008
Bonded Thru Stegall Notary Service

[ADDRESS OMITTED IN PRINTING]

INDUCED TERMINATIONS PERFORMED IN MISSISSIPPI IN 1997
BY PRIMARY PROCEDURE AND MONTH PROCEDURE WAS DONE

	MONTH					
	JAN	FEB	MAR	APR	MAY	JUN
	N	N	N	N	N	N
PROCEDURE						
SUCTION CURRETTAGE	244	231	232	183	229	179
SHARP CURRETTAGE	0	0	0	0	1	0
DILATION & EVACUATION	165	185	177	138	193	180
INTRA-UTERINE PROSTAGLANDIN INSTALLATION	0	2	3	0	3	0
OTHER	1	4	2	0	1	2
TOTAL	410	422	414	321	427	361

B-2 (continued)

INDUCED TERMINATIONS PERFORMED IN MISSISSIPPI IN 1997 BY PRIMARY PROCEDURE AND MONTH PROCEDURE WAS DONE

	MONTH						
	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
	N	N	N	N	N	N	N
PROCEDURE							
SUCTION CURRETTAGE	222	204	188	191	185	206	2494
SHARP CURRETTAGE	0	0	0	0	0	0	1
DILATION & EVACUATION	129	196	94	136	115	80	1788
INTRA-UTERINE PROSTAGLANDIN INSTALLATION	2	0	2	5	2	4	23
OTHER	3	4	1	0	0	1	19
TOTAL	356	404	285	332	302	291	4325

INDUCED TERMINATIONS PERFORMED IN MISSISSIPPI IN 2000
BY PRIMARY PROCEDURE AND MONTH PROCEDURE WAS DONE

	MONTH					
	JAN	FEB	MAR	APR	MAY	JUN
	N	N	N	N	N	N
PRIMARY PROCEDURE						
SUCTION CURRETTAGE	289	361	394	306	296	356
DILATION & EVACUATION	55	1	1	1	0	0
INTRA-UTERINE INSTILLATION	2	1	3	1	1	1
SHARP CURRETTAGE	0	0	0	0	0	0
HYSTEROTOMY/HYSTERECTOMY	0	0	0	0	0	0
OTHER	2	1	1	0	2	4
TOTAL	348	364	399	308	299	361

B-3 (continued)

INDUCED TERMINATIONS PERFORMED IN MISSISSIPPI IN 2000
BY PRIMARY PROCEDURE AND MONTH PROCEDURE WAS DONE

	MONTH						TOTAL
	JUL	AUG	SEP	OCT	NOV	DEC	
	N	N	N	N	N	N	N
PRIMARY PROCEDURE							
SUCTION CURRETTAGE	263	297	287	235	275	294	3653
DILATION & EVACUATION	0	0	1	9	0	0	68
INTRA-UTERINE INSTILLATION	0	0	2	0	1	2	14
SHARP CURRETTAGE	0	0	0	0	0	1	1
HYSTEROTOMY/HYSTERECTOMY	0	0	0	1	0	0	1
OTHER	0	2	4	3	2	0	21
TOTAL	263	299	294	248	278	297	3758

APPENDIX C

SOUTH DAKOTA

[STATE SEAL]

DIVISION OF ADMINISTRATION
600 East Capitol Avenue
Pierre, South Dakota 57501-2536
605/773-3361 FAX: 605/773-5683
www.state.sd.us/doh

Paul Benjamin Linton
Attorney at Law
921 Keystone Avenue
Northbrook, IL 60062

RE: Table entitled "Induced Abortions Occurring in South Dakota by Month of Abortion and Type of Procedure, 1997".

State of South Dakota) Department
County of Hughes) of Health

I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this 20 day of March, 2006

/s/ Katherine S. Mueller , Administrator, Office of Data, Statistics, and Vital Records

Subscribed and sworn to before me, this 20th day of March, 2006.

/s/ Kathleen Zachmeier
Notary Public: South Dakota

My commission expires: *10-27-2010*

INDUCED ABORTIONS OCCURRING IN SOUTH DAKOTA BY MONTH OF ABORTION AND TYPE OF PROCEDURE, 1997

	TOTAL	TYPE PROCEDURE	
		Suction Curettage	Dilation and Evacuation (D&E)
Total	919	702	217
MONTH OF ABORTION			
January ...	74	74	0
February ..	100	99	1
March	90	90	0
April	102	102	0
May	76	76	0
June	70	70	0
July	95	95	0
August ...	79	79	0
September .	49	15	34
October ...	74	0	74
November .	54	0	54
December .	54	0	54
Not Stated .	2	2	0

Source: South Dakota Department of Health

[STATE SEAL]

DIVISION OF ADMINISTRATION
600 East Capitol Avenue
Pierre, South Dakota 57501-2536
605/773-3361 FAX: 605/773-5683
www.state.sd.us/doh

Paul Benjamin Linton
Attorney at Law
921 Keystone Avenue
Northbrook, IL 60062

RE: Table entitled "Induced Abortions Occurring in South Dakota by Type of Procedure, 1996 and 1998".

State of South Dakota) Department
County of Hughes) of Health

I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this 20 day of March, 2006

/s/ Katherine S. Mueller , Administrator, Office of Data, Statistics, and Vital Records

Subscribed and sworn to before me, this 20th day of March, 2006.

/s/ Kathleen Zachmeier
Notary Public: South Dakota

My commission expires: *10-27-2010*

INDUCED ABORTIONS OCCURRING IN
SOUTH DAKOTA BY PROCEDURE, 1996

Total	901
PROCEDURE TYPE	
SUCTION CURETTAGE	595
DILATION & EVACUATION	306

Source: South Dakota Department of Health

INDUCED ABORTIONS OCCURRING IN
SOUTH DAKOTA BY PROCEDURE, 1998

Total	674
PROCEDURE TYPE	
SUCTION CURETTAGE	1
DILATION & EVACUATION	673

Source: South Dakota Department of Health

[STATE SEAL]

DIVISION OF ADMINISTRATION

600 East Capitol Avenue
Pierre, South Dakota 57501-2536
605/773-3361 FAX: 605/773-5683
www.state.sd.us/doh

Paul Benjamin Linton
Attorney at Law
921 Keystone Avenue
Northbrook, IL 60062

RE: Table entitled "Induced Abortions Occurring in South Dakota by Month of Abortion and Type, 2000".

State of South Dakota)
County of Hughes)
Department of Health

I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this 20 day of March, 2006

/s/ Katherine S. Mueller , Administrator, Office of Data, Statistics, and Vital Records

Subscribed and sworn to before me, this 20th day of March, 2006.

/s/ Kathleen Zachmeier
Notary Public: South Dakota

My commission expires: *10-27-2010*

INDUCED ABORTIONS OCCURRING IN SOUTH DAKOTA BY MONTH OF ABORTION AND TYPE OF PROCEDURE, 2000

MONTH OF ABORTION	TYPE OF PROCEDURE			
	Total	Sharp Curettage	Dilation and Evacuation (D&E)	Medical
Total	878	840	25	13
January-June	449	438	6	5
July-December	429	402	19	8

APPENDIX D

VIRGINIA

[STATE SEAL]

COMMONWEALTH OF VIRGINIA
Department of Health

CALVIN REYNOLDS
DIRECTOR

CENTER FOR HEALTH
STATISTICS
P.O. BOX 1000
RICHMOND, VA 23218-1000
(804) 662-6276

DECLARATION OF CUSTODIAN OF PUBLIC RECORD
FEDERAL RULES OF EVIDENCE, RULE 803(8)

I, Calvin T. Reynolds, Director, Division of Health Statistics, Office of Vital Records and Health Statistics, Virginia Department of Health, Commonwealth of Virginia, hereby certify that I am custodian of the records of the Division of Health Statistics, Office of Vital Records and Health Statistics, Virginia Department of Health, a public office of the Commonwealth of Virginia, not pertaining to a court, and I do certify that the document annexed to this certificate is a true and correct copy of an original, which is on file in my office located at 1601 Willow Lawn Drive, Suite 237, Richmond, Virginia, and that the original is a record kept in that office.

Dated, and the official seal of my office affixed, this 5th day of April 2006.

/s/ Calvin T. Reynolds
Calvin T. Reynolds
Director, Division of Health Statistics
Office of Vital Records and Health Statistics
Virginia Department of Health
Commonwealth of Virginia

INDUCED TERMINATIONS OF PREGNANCY OCCURRING IN VIRGINIA BY MONTH OF OCCURRENCE BY PROCEDURE TERMINATING PREGNANCY, VIRGINIA 1998

Month of Occurrence	Total	Curettage		Dilation & Evacuation	IU Instillation	
		Suction	Sharp		Saline	Prostaglandin
January	2,488	2,395	1	25	2	6
February	2,083	1,992		23		5
March	2,238	2,128	3	22		12
April	2,138	2,062		26		5
May	2,176	2,082	2	26	1	13
June	2,218	2,120	3	22	3	7
Sub-total	***13,341***	***12,779***	***9***	***144***	**6**	***48***
July	2,202	2,096	1	22		6
August	2,112	2,021	2	14	1	5
September	1,984	1,867	1	25	1	10
October	2,355	2,249	1	15	2	11
November	2,005	1,905		22		11
December	2,115	2,002		26	1	7
Sub-total	***12,773***	***12,140***	***5***	***124***	***5***	***50***
Unknown	1	1				
TOTAL	26,115	24,920	14	268	11	98

INDUCED TERMINATIONS OF PREGNANCY OCCURRING IN VIRGINIA BY MONTH OF OCCURRENCE BY PROCEDURE TERMINATING PREGNANCY, VIRGINIA 1998

Month of Occurrence	Hysterotomy	Hysterectomy	Other	Unknown
January			51	8
February			61	2
March			63	10
April			40	5
May			50	2
June			55	8
Sub-total	***0***	***0***	***320***	***35***
July	1		73	3
August	1	1	59	8
September		1	76	3
October			70	7
November			55	12
December	1		70	8
Sub-total	***3***	***2***	***403***	***41***
Unknown				
TOTAL	3	2	723	76

D-2 (continued)

Month of Event by Termination Procedure Reported
Induced Terminations of Pregnancy, Virginia, 1997

Month of Occurrence	Curettage		Dilation & Evacuation	IU Instillation		Hysterotomy
	Suction	Sharp		Saline	Prostaglandin	
January	2,449	11	9	2	9	1
February	2,294	1	16	2	8	
March	2,418		16		4	
April	2,156	3	25		4	
May	2,360	2	11	1	10	
June	2,035	2	22		7	1
Sub-total	***13,712***	***19***	***99***	***5***	***42***	***2***
July	2,308	2	13		3	
August	2,184		23		4	
September	1,794		18		7	
October	1,992	1	24		7	
November	1,803	3	20	2	5	
December	1,767	4	23		2	
Sub-total	***11,848***	***10***	***121***	***2***	***28***	–
TOTAL	25,560	29	220	7	70	2

Month of Event by Termination Procedure Reported
Induced Terminations of Pregnancy, Virginia, 1997

Month of Occurrence	Hysterectomy	Other	Unknown	Total
January	1	5	3	2,489
February	1	7	4	2,334
March		11	5	2,454
April		7	3	2,198
May		8	10	2,402
June		6	9	2,082
Sub-total	***2***	***44***	***34***	***13,959***
July		2	6	2,334
August		8	4	2, 223
September		14	2	1,835
October		5	4	2,033
November		19	3	1,855
December		43	11	1,850
Sub-total	–	***91***	***30***	***12,130***
TOTAL	2	135	64	26,089

D-3 (continued)

Month of Event by Termination Procedure Reported
Induced Terminations of Pregnancy, Virginia, 2000

Month of Occurrence	PROCEDURE TERMINATING PREGNANCY				
	Curettage		Dilation and Evacuation	Intra-Uterine Instillation Saline or Prostaglandin	Medical (Nonsurgical)
	Suction	Sharp			
January	2018	143	151	1	59
February	2292	138	186		71
March	2175	131	225	1	80
April	1885	110	206		68
May	1909	121	175	2	80
June	1988	115	197	3	87
Sub-total	***12267***	***758***	***1140***	***7***	***445***
July	1772	215	160	2	85
August	1736	373	182	2	99
September	1690	248	206	1	75
October	1688	125	161	2	86
November	1705	122	148		94
December	1914	106	157		70
Sub-total	***10505***	***1189***	***1014***	***7***	***509***
TOTAL	22,772	1,947	2,154	14	954

Month of Event by Termination Procedure Reported
Induced Terminations of Pregnancy, Virginia, 2000

Month of Occurrence	PROCEDURE TERMINATING PREGNANCY			
	Hysterotomy or Hysterectomy	Other	Unknown	Total
January		5	5	2,382
February		2	8	2,697
March		9	8	2,629
April		4	4	2,277
May		5	6	2,298
June		7	4	2,401
Sub-total	***0***	***32***	***35***	***14,684***
July		4	7	2,245
August		8	5	2,405
September		7	5	2,232
October		11	10	2,083
November		6	6	2,081
December		11	11	2,269
Sub-total	***0***	***47***	***44***	***13,315***
TOTAL	–	79	79	27,999

APPENDIX E
SOUTH CAROLINA

ABORTIONS BY TYPE OF PROCEDURE BY MONTH
SOUTH CAROLINA, 1997
(OCCURRENCE DATA)

TYPE OF PROCEDURE	SOUTH CAROLINA	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE
Suction Curettage	9,158	840	813	874	826	834	727
D & E	2	-	-	-	1	-	-
Saline	1	-	-	-	-	-	1
Prostaglandin Instill	20	4	1	1	2	1	3
Other	26	3	2	3	1	-	1
Unknown	5	1	-	-	1	-	1
Total	9,212	848	816	878	831	835	733

TYPE OF PROCEDURE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER
Suction Curettage	808	803	687	676	630	640
D & E	-	-	-	-	1	-
Saline	-	-	-	-	-	-
Prostaglandin Instill	2	1	1	1	3	-
Other	3	2	1	3	4	3
Unknown	-	1		-	-	1
Total	813	807	689	680	638	644

Prepared by: Division of Biostatistics and Health GIS, Public Health Statistics and Information Services, South Carolina Department of Health and Environmental Control, Columbia, 29201.

ATTEST: These data were tabulated from official Induced Termination of Pregnancy reports (abortions) filed with the South Carolina Department of Health and Environmental Control.

DATE: 3/22/06

/s/ Murray B. Hudson
Murray B. Hudson, M.P.H.
Director of Public Health Statistics & Information Services

ABORTIONS BY TYPE OF PROCEDURE
SOUTH CAROLINA, 1996 & 1998
(OCCURRENCE DATA)

TYPE OF PROCEDURE	1996	1998
SOUTH CAROLINA	9,326	8,801
Suction Curettage	9,231	8,769
Sharp Curettage	16	2
D & E	14	-
Prostaglandin Instill	28	10
Hysterectomy	1	1
Other	29	15
Unknown	7	4

ABORTIONS BY TYPE OF PROCEDURE BY MONTH
SOUTH CAROLINA, 2000
(OCCURRENCE DATA)

Frequency	Suction Curettage	Sharp Curettage	D & E	Saline Instillation
January	700	-	-	-
February	692	-	-	-
March	678	-	-	-
April	680	-	-	-
May	668	-	-	-
June	608	-	1	-
July	569	-	-	-
August	632	1	-	-
September	584	2	-	-
October	541	-	-	-
November	503	-	-	-
December	594	-	-	-
Total	7449	3	1	-

E-3 (continued)

Frequency	Prostaglandin Instillation	Hysterotomy/ Hysterectomy	Medical (Nonsurgical)	Other
January	-	-	-	1
February	-	-	-	2
March	1	-	-	2
April	1	-	-	3
May	1	-	-	1
June	-	-	-	3
July	-	-	-	2
August	-	-	-	2
September	3	-	-	3
October	-	-	-	10
November	3	-	-	12
December	1	-	9	14
Total	10	-	9	55

Prepared by:
Division of Biostatistics
Office of Public Health Statistics and Information Services
South Carolina Department of Health and Environmental Control Columbia, SC 29201

ATTEST: These data were tabulated from official Induced Termination of Pregnancy reports (abortions) filed with the South Carolina Department of Health and Environmental Control.

DATE: March 22, 2006

/s/ Murray B. Hudson
Murray B. Hudson, M.P.H.
Director of Public Health Statistics & Information Services

APPENDIX F

TENNESSEE

[STATE SEAL]
STATE OF TENNESSEE
Department of Health
CORDELL HULL BUILDING
425 5TH AVENUE NORTH
NASHVILLE, TENNESSEE 37247

I, Teresa S. Hendricks, Manager of Statistical Services, Tennessee Department of Health, certify that the attached tables "1996 Recorded Abortions in Tennessee, Table by month by Procedure", "1997 Recorded Abortions in Tennessee, Table by month by Procedure", and "1998 Recorded Abortions in Tennessee, Table by month by Procedure" were obtained from this office.

These tables were prepared from an electronic data file compiled from records and reports required to be filed with the Tennessee Department of Health pursuant to Tennessee Code Annotated 39-15-203. These tables have been reviewed and checked and, to the best of my knowledge, reflect an accurate portrayal of information reported to the Tennessee Department of Health.

/s/ Teresa S. Hendricks
Teresa S. Hendricks
Manager, Statistical Services

Personally appeared before me, *Katherine E. Henson*, a Notary Public in and for the said State and County, the within named Teresa S. Hendricks, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, who acknowledged that she executed the within instrument for the purposes therein contained.

Witness my hand on this *20th* day of March 2006.

[SEAL]

/s/ Katherine E. Henson
Notary Public

My Commission Expires JAN 23, 2010.

1997 Recorded Abortions Tennessee
Month of Occurrence By Primary Procedure
The FREQ Procedure
Table of Procedure by Month

Procedure Frequency	Month Jan	Feb	Mar	April	May	June	July
Suction Curettage	1650	1658	1610	1453	1571	1447	1607
Dilation & Evacuation	0	0	2	0	0	2	0
Intra-Uterine Instillation	0	0	0	0	0	0	0
Intra-Uterine Prostaglandin	5	5	2	5	7	2	3
Hysterectomy	0	0	1	0	0	0	0
Unknown	0	0	0	0	0	0	0
Total	1655	1663	1615	1458	1578	1451	1610

F-2 (continued)

Procedure / Month	Aug	Sept	Oct	Nov	Dec	Unknown	Total
Suction Curettage	1575	1446	1442	1351	1398	4	18212
Dilation & Evacuation	0	2	0	0	1	0	7
Intra-Uterine Instillation	0	0	1	0	0	0	1
Intra-Uterine Prostaglandin	4	3	7	9	4	0	56
Hysterectomy	0	0	0	0	0	0	1
Unknown	1	0	0	2	3	0	6
Total	1580	1451	1450	1362	1406	4	18283

Source: Tennessee Department of Health, Division of Health Statistics.

1996 Recorded Abortions Tennessee
Month of Occurrence By Primary Procedure
The FREQ Procedure
Table of Procedure by Month

Procedure Frequency	Month Jan	Feb	Mar	April	May	June	July
Suction Curettage	1584	1504	1768	1514	1511	1530	1424
Sharp Curettage	1	0	0	2	1	1	0
Dilation & Evacuation	0	0	0	1	1	0	0
Intra-Uterine Instillation	0	0	0	0	0	1	0
Intra-Uterine Prostaglandin	4	9	3	5	6	3	5
Hysterectomy	1	0	0	0	0	0	0
Unknown	1	3	3	2	0	0	1
Total	1591	1516	1774	1524	1519	1535	1430

Procedure Frequency	Month Aug	Sept	Oct	Nov	Dec	Unknown	Total
Suction Curettage	1560	1339	1450	1408	1307	4	17903
Sharp Curettage	0	0	1	0	0	0	6
Dilation & Evacuation	1	0	0	1	0	0	4
Intra-Uterine Instillation	0	0	0	0	0	0	1
Intra-Uterine Prostaglandin	6	2	7	7	4	1	62
Hysterectomy	0	0	0	0	0	0	1
Unknown	2	0	0	0	0	0	12
Total	1569	1341	1458	1416	1311	5	17989

Source: Tennessee Department of Health, Division of Health Statistics.

1998 Recorded Abortions Tennessee
Month of Occurrence By Primary Procedure
The FREQ Procedure
Table of Procedure by Month

Procedure Frequency	Month Jan	Feb	Mar	April	May	June	July
Other	0	0	0	1	1	0	1
Suction Curettage	1696	1612	1584	1421	1442	1513	1344
Dilation & Evacuation	6	14	6	2	6	5	16
Intra-Uterine Instillation	0	0	0	0	0	0	1
Intra-Uterine Prostaglandin	1	3	12	1	2	5	3
Hysterotomy	0	0	0	0	0	0	1
Hysterectomy	0	0	0	0	0	1	1
Unknown	14	9	39	6	23	6	3
Total	1717	1638	1641	1431	1474	1530	1370

Procedure Frequency	Month Aug	Sept	Oct	Nov	Dec	Unknown	Total
Other	1	0	0	0	2	0	6
Suction Curettage	1428	1312	1342	1106	1200	89	17089
Dilation & Evacuation	9	1	0	0	0	1	66
Intra-Uterine Instillation	2	0	0	0	0	0	3
Intra-Uterine Prostaglandin	7	1	2	5	4	0	46
Hysterotomy	0	0	0	0	0	0	1
Hysterectomy	0	0	0	0	0	0	2
Unknown	10	9	4	34	29	4	190
Total	1457	1323	1348	1145	1235	94	17403

Source: Tennessee Department of Health, Division of Health Statistics.